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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

JUL 10 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
McLEODUSA TELECOMMUNICATIONS	)	CC Docket No. 98-84
SERVICES, INC.	)	
	)	
Petition for Preemption of Nebraska Public	)	
Service Commission Decision Permitting	)	
Withdrawal of Centrex Plus Service by	)	
U S WEST Communications, Inc.	)	

**OPPOSITION OF U S WEST COMMUNICATIONS, INC.**

U S WEST Communications, Inc. ("U S WEST") hereby submits this Opposition to a Petition for Preemption, Declaratory Ruling, and Injunctive Relief ("Petition"), filed May 29, 1998 by McLeodUSA TELECOMMUNICATIONS SERVICES, INC. ("McLeod").<sup>1</sup> In its Petition, McLeod requests that the Federal Communications Commission ("Commission") issue an order preempting the decision of the Nebraska Public Service Commission ("PSC") which permitted U S WEST to withdraw its Centrex Plus offering, subject to certain "grandfathering" rights of existing customers and the right of resellers to sell Centrex Plus to such "grandfathered" customers. McLeod, which has never

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<sup>1</sup> In the Matter of McLeodUSA Telecommunications Services, Inc. Petition for Preemption of Nebraska Public Service Commission Decision Permitting Withdrawal of Centrex Plus Service by U S WEST Communications, Inc., CC Docket No. 98-84, filed May 29, 1998. Public Notice, Pleading Cycle Established for Comments on McLeodUSA Telecommunications Services, Inc. Petition for Preemption, Declaratory Ruling, and Injunctive Relief, DA 98-1099, rel. June 10, 1998.

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provided common carrier services as a reseller of Centrex Plus service in Nebraska and was not certified to do so at the time it filed its complaint with the Nebraska PSC, contends that the action of the Nebraska PSC in issuing its order sustaining in part and denying in part McLeod's complaint was anti-competitive and subject to preemption pursuant to Section 253 of the Communications Act.<sup>2</sup>

#### I. INTRODUCTORY STATEMENT

McLeod has presented no meaningful facts in support of its preemption Petition. In context, it actually appears that McLeod's argument is that the Nebraska PSC did not give sufficient credence to McLeod's arguments. McLeod seems to contend that it is entitled to an Administrative Procedure Act review of the Nebraska PSC Order -- conducted by this Commission. For example, McLeod contends that "the PSC failed to engage in any substantive scrutiny of U S WEST's actions pursuant to the local competition provisions of the 1996 Act,"<sup>3</sup> and that "[t]he Nebraska PSC was obligated under federal law to engage in a thorough and thoughtful analysis (such as that recommended by PSC Commissioner Johnson in dissent) in considering the anti-competitive implications of U S WEST's Centrex withdrawal."<sup>4</sup> McLeod's most basic theory is that the Nebraska PSC's analysis was faulty and that McLeod has a federal right of review at the Commission of state regulatory decisions which fail to afford what McLeod perceives as reasoned decision-making in analyzing issues raised under the 1996 Act.

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<sup>2</sup> Petition at 6-8.

<sup>3</sup> Id. at 8.

<sup>4</sup> Id. at 9.

At its base, this is a ridiculous position. While the Commission clearly has the right and duty to preempt state regulatory decisions which have the anti-competitive consequences described in Section 253 of the 1996 Act, this review must be based on factual documentation, not on allegations that the reasoning in the state commission decision was faulty. Preemption of state regulatory decisions because they have anti-competitive consequences is quite a different matter than preemption of a state regulatory decision because the Commission perceives that the state's decision-making process was faulty or less than compelling. In order to invoke Section 253, McLeod must document the actual adverse competitive impacts of the Nebraska PSC's decision. The reasoning behind the Nebraska PSC's decision must be, except in the most extraordinary circumstances, reviewable only in the proper state court pursuant to state law (a remedy of which McLeod has already availed itself). McLeod's demand that the Commission preempt the regulatory actions of the Nebraska PSC because McLeod is unhappy with the reasoning of the PSC, and anticipates similar unhappiness with the logic of the Nebraska Supreme Court, is predicated on a reading of the Commission's power over sovereign state actions which is not sustainable under any circumstances. Any preemption petition under Section 253 must be based on actual facts, not dissatisfaction with the logic behind the decision of a state regulatory commission.

The Petition does raise two issues which will actually be of major consequence when properly presented to the Commission: 1) The extent to which the Commission can delve into issues of local ratemaking and service issues pursuant to Section 251. It is hard to imagine a more intensely local issue than a

decision by a state commission on withdrawal of a local exchange service. 2) The extent to which any regulatory agency, state or federal, may lawfully demand that an incumbent local exchange carrier ("ILEC") continue to offer under governmental compulsion a local exchange service simply because a competitor wishes to resell the service to others. Both of these issues will need to be decided in the future as carriers and regulators continue to sort things out under the 1996 Act. However, the factual context of the McLeod Petition presents a uniquely poor vehicle for addressing any of the important matters raised therein. The fact that McLeod disagrees with the logic of the Nebraska PSC, and expects to disagree with the logic of an anticipated Nebraska Supreme Court decision, provide no basis whatsoever for relief. The Petition should simply be denied forthwith.

## II. MCLEOD'S PETITION PRESENTS NO MEANINGFUL FACTS

In February of 1996, U S WEST announced that it was withdrawing its Centrex Plus product. Centrex Plus is a normal local exchange service. This decision was made for business reasons -- the product was not successful in the new competitive market. It had been developed decades earlier by AT&T as a customer premises equipment ("CPE") alternative in an entirely different market, and has become unsuited as a product in today's market. As pointed out in the Petition, resale of Centrex in competition with other regulated U S WEST services has also become an arbitrage vehicle which was jeopardizing the stability of subsidized local residential rates. Thus, as a business decision, U S WEST chose to cease providing Centrex Plus service, and duly filed the appropriate documents with the regulatory commissions in states where Centrex Plus was offered. As is likewise noted in the

Petition, U S WEST was denied, at least initially. withdrawal permission in some of its states. Under Nebraska statutes, U S WEST is not required to obtain the PSC's approval before withdrawing a service and in spite of the demands of McLeod, AT&T and MCI, the Nebraska PSC refused to deny U S WEST the right to withdraw its Centrex Plus product line, subject to a variety of grandfathering obligations. U S WEST is required to make Centrex Plus service available to certificated resellers of local service in Nebraska so that such resellers could offer the service on a resale basis to U S WEST's grandfathered Centrex Plus customers.

McLeod subsequently appealed the Nebraska PSC's decision to the Nebraska Supreme Court, where it made the same arguments it has made in its Petition -- that McLeod was entitled to coerce U S WEST to continue to offer the Centrex product because McLeod wanted to use it in the future for resale purposes. The case was argued on April 9, 1998. A decision is pending.

As a factual matter, McLeod has never used Centrex as a resale vehicle in Nebraska. However, McLeod alleges as factual matters four indicia that purportedly document the notion that the Nebraska PSC's action permitting the withdrawal of Centrex Plus "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."<sup>5</sup>

First, McLeod argues that the opinion of the dissenting Commissioner in

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<sup>5</sup> 47 U.S.C. § 253(a).

Nebraska agreed with McLeod's arguments.<sup>6</sup> The fact that a state commissioner dissented from a PSC decision does not provide the Commission with any preemption power over the state commission itself. If anything, Commissioner Johnson's decision highlights the attention which the Nebraska PSC gave to McLeod's arguments.

Second, McLeod complains that other state commissions have agreed with McLeod, and disagreed with U S WEST.<sup>7</sup> On the other hand, certain state commissions have agreed with U S WEST and disagreed with McLeod, e.g., Montana and Idaho. For better or worse, such is the nature of federalism. If Congress had wanted total uniformity in regulating local telecommunications services, it would not have written the Communications Act the way it did. The Nebraska PSC is a group of independent and strong-minded individuals. It is not only unsurprising, but beneficial, that they are also independent thinkers on key telecommunications matters.

Third, McLeod contends that anti-competitive action by the Nebraska PSC is demonstrated by the fact that "U S WEST's own executives stated that the purpose of the withdrawal was to avoid 'arbitrage' - a euphemism for competition by resale[.]"<sup>8</sup> In point of fact, U S WEST has pointed out that Centrex resale presents arbitrage opportunities for companies like McLeod, and that this arbitrage is anti-competitive, anti-economic and anti-public interest. However, U S WEST has never

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<sup>6</sup> Petition at 20-21.

<sup>7</sup> Id. at 21-23.

<sup>8</sup> Id. at 19, 23-26.

stated that arbitrage is a “euphemism for resale.” Quite to the contrary, arbitrage is the uneconomic leveraging of disparate prices of similar services against one another, and is generally designed to take advantage of pricing anomalies imposed by regulators. Indeed, in the telecommunications marketplace of today, arbitrage is usually based on undercutting telephone rates containing implicit subsidies that are being utilized to keep local residential rates below cost. These implicit subsidies are themselves unlawful under the 1996 Act, and are required to be removed by both federal and state regulators.<sup>9</sup> A company’s efforts to eliminate arbitrage opportunities are not only entirely permissible and necessary under the 1996 Act, they are ultimately pro-competitive and must be supported by regulators at both the federal and state levels.

Finally, McLeod argues that U S WEST has a duty to implement a Centrex replacement in order for its withdrawal of Centrex to be lawful.<sup>10</sup> In point of fact, U S WEST has a wide variety of local exchange products and services available for resale. But even if no substitute service were available, such would not by itself prove anything about whether the action of the Nebraska PSC permitting Centrex service to be withdrawn was a violation of Section 253(a). The allegation of McLeod is completely unsupported -- nothing further of substance is offered.

The bottom line is that McLeod offers no facts at all to sustain its contention that the Nebraska PSC’s decision to permit U S WEST to withdraw the Centrex Plus product is anti-competitive. The U S WEST decision was made for good and

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<sup>9</sup> See 47 U.S.C. § 254.

sufficient business reasons, and was confirmed by the Nebraska PSC under Nebraska law. McLeod has offered no factual basis at all on which to disturb the decision.

### III. THE LEGAL ISSUES RAISED BY MCLEOD ARE TOO IMPORTANT TO BE DETERMINED IN THE ABSENCE OF A FACTUAL CONTEXT

As noted above, the legal issues raised by McLeod are complex and important, and it would be most unwise to attempt to decide any of them in a vacuum -- i.e., in the absence of a solid factual predicate. In a nutshell, these issues are:

First, what is the scope of the Commission's authority over traditionally local ratemaking decisions under Section 253 of the 1996 Act. Just how far can the Commission go, and is the Commission willing to go, to actually rout out state rules regulating local services which have anti-competitive consequences. For example, most states, continue the practice of subsidizing local residential rates with above-cost business rates and other implicit subsidies. Such practices are clearly anti-competitive and, presumably, subject to Section 253 preemption. The legal predicate of McLeod's Petition must be based on the Commission's authority and duty to preempt state ratemaking decisions which retained implicit subsidies to subsidize below-cost rates for certain classes of customers. Such a decision by the Commission must perforce be made based on a complete factual record demonstrating with precision the nature of the state regulatory decision and

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<sup>10</sup> Petition at 26-27.

its impact on the competitive marketplace. For example, in the case of a state regulatory decision which retained below cost prices for some services through the continuance of implicit subsidies, such proof would no doubt come in the form of economic analysis documenting that it is difficult, if not impossible, to compete against a service which is offered below its actual provisioning cost. A mere statement that McLeod would like to use Centrex services in order to resell them, which is the essential factual predicate for the instant Petition, clearly does not suffice.

Second, any government action which would have the effect of coercing a company to offer a service against its will, especially when the reason for such coercion is to ensure that a competitor can engage in arbitrage against the company's other services, would raise extremely serious issues of law, policy and the Constitution. Indeed, such a coercive ruling would probably cross the line and result in an actual governmental expropriation of the property of the affected carrier. Such a decision, if the Commission were to be motivated to make it, could only be justified on the most extreme set of facts, not the general fluff presented by McLeod.

The Commission will no doubt be called upon to address these issues in the future. The McLeod Petition, with its almost total absence of facts, presents a particularly poor vehicle for beginning this important analysis.

#### IV. CONCLUSION


In conclusion, the McLeod Petition presents nothing to justify any Commission analysis or action under Section 253 of the 1996 Act. It likewise

presents no reason to begin analyzing, in a formal manner, the key legal issues which it raises. The Commission should simply dismiss the McLeod Petition. However, the Commission would be well advised, to the extent that in-depth analysis of the legal issues described above has not already commenced, to begin such analysis immediately, in order that timely action can be taken on a proper petition.

Respectfully submitted,

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By:



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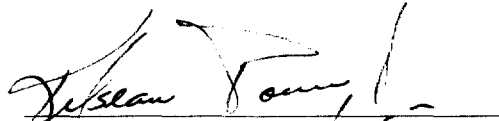
Its Attorney

Of Counsel,  
Dan L. Poole

July 10, 1998

## CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 10<sup>th</sup> day of July, 1998, I have caused a copy of the foregoing **OPPOSITION OF U S WEST COMMUNICATIONS, INC.** to be served, via first class United States Mail, postage pre-paid, upon the persons listed on the attached service list.

  
Kelseau Powe, Jr.

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